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MORRIS DUFFY ALONSO & FALEY

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## Municipal Law Update

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### **Court of Appeals Finds Defendant's Duty to Abate Icy Condition Had Not Yet Arisen at Time of Plaintiff's Fall, Since Storm was in Progress**

Sherman v. New York State Thruway Authority, 27 N.Y.3d 1019 (2016)

Plaintiff sustained injuries when he slipped and fell on an icy sidewalk located on property owned and maintained by defendant New York State Thruway Authority. Plaintiff brought suit against the defendant alleging that it negligently failed to maintain the sidewalk by failing to remove ice and/or place salt after a winter storm.

The defendant moved for summary judgment under the “storm in progress” doctrine, alleging that the storm was still in progress at the time of plaintiff’s accident and, as such, could not be found liable. The trial court denied the motion, finding questions of fact as to whether a storm was in progress at the time of plaintiff’s fall. The Appellate Division reversed and the Court of Appeals affirmed.

In support of its motion, the defendant submitted uncontested evidence that a storm was ongoing at the time of plaintiff’s fall. Specifically, plaintiff testified at his deposition that an ice storm had taken place the night before the accident and that a mix of snow, sleet and rain continued through the next morning, at which time plaintiff fell. In addition, plaintiff testified and a weather report confirmed that it was still raining at the time plaintiff fell. Given that precipitation was falling at the time of plaintiff’s accident and had been for a substantial amount of time prior, while temperatures remained near freezing, defendant established that the storm was still in progress and the defendant’s duty to abate the icy condition had not yet arisen.

### **Court of Appeals Holds that New York City Administrative Code § 7-210 Does Not Restrict Liability to Abutting Property Owner**

Sangaray v. West River Assoc., 26 N.Y.3d 793 (2016)

This action stems from plaintiff’s trip and fall on a sidewalk. The expansion joint that plaintiff tripped over abutted defendant Mercedo’s property. However, most of the sunken

sidewalk square that plaintiff traversed prior to his trip and fall abutted defendant West River's property. West River moved for summary judgment on the grounds that the area where plaintiff tripped was located entirely in front of the Mercedo property.

The Court of Appeals denied West River's motion citing to section 7-210 of the New York City Administrative Code, which imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that said owners are liable for personal injury that is proximately caused by such failure. The Court explained that section 7-210 does not restrict a landowner's liability for accidents that occur on its own abutting sidewalk. The location of an alleged defect and whether it abuts a particular property is significant concerning that particular property owner's duty to maintain the sidewalk in a reasonably safe condition. However, that does not foreclose the possibility that a neighboring property owner may be subject to liability for failing to maintain its own abutting sidewalk in a reasonably safe condition where it appears that such failure constituted a proximate cause of the injury sustained.

**Second Department Finds City Liable for Plaintiff's Fall on Sidewalk Where City Breached Special Duty Owed to Defendant Adjacent Property Owner**

Stanciu v. Bilello, 138 A.D.3d 824 (2d Dept. 2016)

Plaintiff commenced this action to recover damages for injuries sustained after tripping and falling on a sidewalk defect. Approximately ten months prior to plaintiff's fall, defendant, the owner of the adjacent property to the sidewalk, was issued a notice by the NYC Department of Transportation of violation for the sidewalk defect, which was allegedly caused by tree roots. Defendant called "311" and was advised that someone from the Department of Forestry needed to inspect the sidewalk around the tree and create a design plan before it could be repaired. Defendant was advised that the DOT would issue a permit to replace the sidewalk after it was inspected. Defendant testified that he made repeated calls seeking to schedule the inspection.

Defendant asserted a third-party cause of action for contribution against the City, alleging that the City had assumed and breached a special duty to defendant and that the plaintiff's accident was caused by the City's negligence in failing to timely inspect the sidewalk and issue a permit for repairs.

The jury found that the City had formed a special relationship with the defendant, such that the City was liable. The City moved to set aside the jury verdict against it. The Supreme Court denied the motion and the Second Department affirmed finding legally sufficient evidence of a special relationship. Specifically, the Court found that plaintiff established: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the party; and (3) the party's justifiable reliance on the municipality's affirmative undertaking.

**Supreme Court Clarifies Definition of “Prevailing Party”**  
**Noting that a Favorable Ruling on the Merits is Not a Necessary Predicate**

CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642 (2016)

This action stems from a Title VII lawsuit filed by the Equal Employment Opportunity Commission (EEOC) against CRST, a trucking company, alleging that multiple employees of CRST were subjected to sexual harassment. The District Court for the Northern District of Iowa granted CRST’s motion for summary judgment on certain claims, barred the EEOC from seeking relief for remaining claimants based on its failure to reasonably investigate or good faith conciliate, and granted CRST’s motion for attorneys’ fees and costs. The Eighth Circuit affirmed in part, remanded in part, and vacated in part. On remand, the District Court awarded CRST over \$4 million in attorneys’ fees. The Eighth Circuit reversed, finding that CRST did not receive a favorable determination on the merits and was not a prevailing party. CRST appealed and certiorari was granted.

The Supreme Court reversed the Eighth Circuit’s decision, concluding that a favorable ruling on the merits is not a necessary predicate to finding that a defendant has prevailed under Title VII’s attorney fee provision. The Supreme Court explained that a defendant achieves its “primary objective whenever the plaintiff’s challenge is rebuffed, irrespective of the precise reason for the court’s decision.” The Court held that a defendant may prevail even if plaintiff’s claims are dismissed for non-meritorious reasons. Furthermore, the Court explained that Congress did not indicate any intention to limit defendant’s recovery of attorney’s fees to only cases when defendants prevail for merits-based reasons. Congressional policy “does not distinguish between merits-based and non-merits-based judgments.”

The Supreme Court remanded the case, in part, to determine whether a defendant must obtain a preclusive judgment to be a prevailing party.

**Western District Reduces Jury Award Given to Man Silenced at a City Hall Meeting**

Anello v. Anderson, 2016 U.S. Dist. LEXIS 75971 (W.D.N.Y. 2016)

Plaintiff, an Italian-American, attended the Niagara Falls City Council meeting and registered to speak during the “good of the community” segment, during which each speaker is allotted five minutes to speak on any topic pertaining to the good of the community that was not listed on the agenda. Anderson, chairman of the city council, presided over the meeting. When it was plaintiff’s turn to speak, he spoke about Councilman Anderson’s ignorance of Italians. Plaintiff was interrupted by Anderson, to which he responded that he “had the floor.” Anderson then said, “No, you don’t have the floor.” Councilman Chris Robins banged his gavel, Councilman Samuel Fruscione turned the recording of the hearing off, and Councilman Anderson directed an officer to remove plaintiff. Ultimately, after plaintiff continued to speak, plaintiff was arrested.

The jury determined that defendants Anderson, Fruscione, and Robins violated plaintiff's First Amendment right to free speech and awarded plaintiff \$30,000 in compensatory damages and \$75,000 in punitive damages. Defendant's moved for judgment as a matter of law and for a new trial. Plaintiff moved for attorney's fees and costs.

Initially, the Court removed councilman Fruscione as a defendant because plaintiff's voice in the city council chambers was not affected by the turning off of the recording and, as such, Fruscione did not restrict plaintiff's speech in anyway. Accordingly, the Court reduced the compensatory damage award by one third, from \$30,000 to \$20,000.

In addition, the Court denied defendant's motion for a new trial on compensatory damages. The Court noted that an award of \$20,000 for compensatory damages, "which falls below the typical range of recovery for 'garden variety' emotional distress damages, is [not] 'so high as to shock the judicial conscience and constitute a denial of justice.'"

As to punitive damages, the Court found that remittitur was warranted "considering the totality of the circumstances, including the limited degree of reprehensibility, the singular nature of the violation, the compensatory award, and the ultimate purpose of punitive damages – to punish and deter future misconduct." The Court found that a \$10,000 punitive damage award against each remaining defendant, for a total of \$20,000 in punitive damages, sufficiently preserved and respected that jury's determination that punitive damages were necessary to punish and deter the defendants, but was not excessive.

### **Second Department Finds Questions of Fact as to Whether Police Officer Drove Recklessly While Chasing a Fleeing Suspect**

Foster v. Suffolk County Police Dept., 137 A.D.3d 855 (2d Dept. 2016)

Police Officer Bogliole responded to a radio dispatch concerning allegedly stolen goods, which he considered a "non-priority" call. At the scene, Officer Bogliole spoke with the man who reported the incident and to the suspect, defendant Licausi. As Officer Bogliole investigated the matter, an argument ensued and Licausi, against Officer Bogliole's orders, got into his car and fled. Officer Bogliole pursued Licausi in his police vehicle, with the lights and sirens on. The pursuit was conducted at high speeds through a residential neighborhood. Ultimately, Licausi, with Officer Bogliole following, drove through a steady red light at an intersection and collided with a car driven by the plaintiff decedent, who died as a result of the injuries sustained in the accident.

Plaintiff decedent's wife brought this action alleging recklessness and negligence. The County moved for summary judgment. The Supreme Court denied the motion and the Second Department affirmed. The Court explained that the County defendants failed to establish that Officer Bogliole did not act in reckless disregard for the safety of others in commencing, conducting, or failing to terminate the high-speed pursuit. Issues of fact existed as to what occurred just moments before the accident and as to whether Licausi did not stop his vehicle for fear of a collision with Officer Bogliole's police vehicle. Furthermore, there was evidence that

Licausi disobeyed several traffic control devices, and that collisions with other cars at earlier intersections were narrowly avoided and, as such, there are questions of fact as to whether Officer Bogliole should have terminated the pursuit.

**First Department Finds Questions of Fact  
as to Probable Cause for Arrest**

Mendez v. City of New York, 137 A.D.3d 468 (1st Dept. 2016)

This action stems from an incident where Police Officer Moreno allegedly observed plaintiff drop an object onto a pile of garbage on the sidewalk. Thereafter, Officer Moreno observed a gun on top of the garbage bags. Plaintiff was arrested and charged with possession of a loaded firearm. Plaintiff was incarcerated for 247 days, during which time he endured strip searches and cavity inspections, and became depressed. Eight months after his arrest, plaintiff was acquitted of all charges. DNA testing did not link plaintiff to the weapon recovered at the scene. Plaintiff brought this action for false arrest, false imprisonment and malicious prosecution.

Defendant City moved for summary judgment on the grounds that probable cause existed by virtue of Officer Moreno's testimony that he observed plaintiff drop an object onto a pile of garbage and then discovered a firearm on top of the garbage. The City's motion was denied on the grounds that crucial facts preceding plaintiff's arrest were in dispute, including whether plaintiff dropped an object onto the pile of garbage. Officer Shea, another officer present before and during the arrest, did not observe any object in plaintiff's hand or plaintiff drop any object onto the garbage. Moreover, plaintiff denied discarding any object. Significantly, while Officer Moreno maintained that he did witness plaintiff drop an object, his observations were not recorded in any relevant paperwork prepared in the moments following the arrest. Accordingly, the issue of fact as to probable cause for the arrest precluded summary dismissal.

**Fourth Departments Holds Contradictory Evidence Raised Issue of Fact  
as to Whether Plaintiff was Wrongfully Arrested**

Wright v. City of Buffalo, 137 A.D.3d 1739 (4th Dept. 2016)

This action stems from an incident in which the police and emergency personnel responded to an individual (the decedent) suffering from a grand mal seizure. The record established that the decedent refused the requests to be transported to a hospital for medical treatment, became agitated and angry with people requesting his compliance with emergency personnel, and was placed in handcuffs and then transported by ambulance to the hospital, where it was determined that decedent sustained shoulder injuries. Plaintiff brought suit alleging wrongful arrest/false imprisonment and excessive force. Defendants moved for summary judgment.

With respect to the wrongful arrest/false imprisonment claim, the Court found that while the defendant submitted evidence establishing that the officers' conduct was undertaken in the

exercise of reasoned professional judgment, contradictory evidence was also submitted. Specifically, plaintiff's testimony, decedent's testimony and a witness's testimony raised questions of fact as to whether decedent was conducting himself in a manner that posed a risk of harm to himself or others. Moreover, plaintiff testified that a paramedic suggested that they give the decedent time to recover from his seizure before taking him to the hospital, and a witness testified that the decedent said "I'll go" and that he just wanted time to get his bearings. As such, defendant's motion was denied.

### **Eastern District Computes Damages for Plaintiff's False Arrest/Imprisonment Claims**

Watson v. The United States of America, 179 F.Supp.3d 251 (E.D.N.Y. 2016)

On May 8, 2008, plaintiff Davino Watson, a United States citizen by virtue of his father's citizenship, was sentenced by a New York State Court for a drug-related conviction. Upon his release, he was taken into custody by government immigration officials who believed that he was not a citizen. Plaintiff was detained for 1,273 days until November 2, 2011. During that time, he was subjected to deportation proceedings, which continued until January 24, 2013. Plaintiff should have been released as an American citizen on or about May 10, 2008.

This case was made complex by the fact that plaintiff did not have an attorney, that the government was repeatedly careless in investigating plaintiff's claim of citizenship, and that on June 4, 2008, while plaintiff was detained, the interpretation of American and Jamaican laws as to "legitimation" changed.

The Court found that under the Federal Tort Claims Act, the government was liable for falsely arresting the plaintiff on May 8, 2008 and for falsely imprisoning him until June 4, 2008.

In calculating an award of damages for false arrest, the Court explained that an individual is entitled to compensatory damages for both the loss of liberty and for the physical and emotional distress. The Court found no aggravating factors, such as physical abuse, public humiliation, or malice and, as such, awarded plaintiff \$15,000 for the false arrest.

With respect to calculating damages for false imprisonment, the Court explained that damages could be either general or special. General damages includes damages for loss of liberty and humiliation or mental suffering, whereas special damages includes damages for physical discomfort, injury to health, lost employment opportunities and injury to reputation. The Court explained that plaintiff's false imprisonment prevented him from exercising the liberty he was preparing to enjoy following his release from prison, which left him angry, panicked, despondent and depressed. However, the conditions in which plaintiff was detained were not severe. The Court awarded plaintiff \$2,000 per day for the 27 days (May 8 – June 4) and \$500 per day for the emotional injury incurred during this period, for a total of \$82,500.

**Second Circuit Finds Insufficient Evidence for Probable Cause and Insufficient Evidence to Support Officer's Motion for Qualified Immunity**

Myers v. Patterson, 819 F.3d 625 (2d Cir. 2016)

In response to reports from plaintiff's son's school that plaintiff was behaving in an irrational manner, caseworker Weitzman of Child Protective Services and Officer Patterson went to plaintiff's home where, according to notes in the record, it was agreed that plaintiff should be sent for a psychiatric evaluation as her behavior was irrational. Plaintiff was arrested based on her supposed dangerousness to her son.

The District Court granted defendant Patterson's motion for qualified immunity and the plaintiff appealed. The Second Circuit vacated and remanded on the grounds that the record was devoid of sufficient evidence that Patterson had probable cause to arrest the plaintiff. While the District Court based its rulings on the fact that Patterson's observations could have offered him reason to believe that plaintiff posed a danger, there was insufficient evidence in the record to support the conclusion that his observations would have reasonably led him to that conclusion.

The Court explained that to handcuff and detain an individual for mental-health reasons, an officer must have "probable cause to believe that the person presented a risk of harm to herself or others." Here, while the caseworker's notes described plaintiff as "annoyed," "very uncooperative," and "irrational," there was no indication that plaintiff appeared dangerous.

With respect to Patterson's claim that he was entitled to qualified immunity, the Court noted that he would only be protected if he reasonably relied on Weitzman's communications of her professional judgment that plaintiff should be seized for psychiatric evaluation because of the danger of serious physical harm to the child. The Court remanded on this issue to examine further what occurred that led to plaintiff's seizure. Specifically, more evidence was needed regarding the encounter, including Patterson's observations, the role played by Weitzman, and the reasonableness of any reliance on Weitzman.

**Second Department Finds that Officers Did Not Employ Excessive Force in Responding to Emergency Call Regarding an Emotionally Disturbed Person**

Davila v. City of New York, 139 A.D.3d 890 (2d Dept. 2016)

This action stems from police officers' response to an emergency call regarding a disturbance at an apartment, where plaintiff lived with his parents. While the officers were attempting to restrain the plaintiff, who had a long history of mental illness and was behaving erratically, both plaintiff and the officers fell down a flight of stairs. Plaintiff commenced this action to recover damages for personal injuries on theories of negligence and excessive force. The jury found in favor of the plaintiff. The defendants moved for judgment as a matter of law dismissing the causes of action for excessive force.

The Court explained that excessive force claims are to be analyzed under the objective reasonableness standard. The record established that by the time the police arrived at the scene, the officers were aware they were dealing with an emotionally disturbed person, that the person had started or attempted to start a fire, and that the person had been throwing items out of the window. Upon entering the apartment, the officers were confronted by plaintiff, who was naked except for a pair of underpants around his ankles. The officers attempted to approach the plaintiff, but the plaintiff punched one of them in the face and fled up the stairs, screaming. The Court found that while the officers could have waited for emergency services to arrive, it cannot be said that they employed excessive force by approaching and speaking to the plaintiff.

The Court further noted that, regardless of whether or not the officers employed excessive force, the officers would be entitled to qualified immunity. The Court noted that officers of reasonable competence could disagree as to whether the officers should have waited for emergency services to arrive, instead of approaching the plaintiff.

Finally, the Court held that defendant's motion to dismiss the cause of action for negligence also should have been granted on the grounds of governmental function immunity. Here, the allegedly negligent acts of the officers were discretionary, not ministerial and therefore, they were precluded from liability.

### **Supreme Court Holds Warrantless Breathalyzer Tests, Not Warrantless Blood Alcohol Tests, Supported by Search Incident to Arrest Doctrine**

Birchfield v. U.S., 136 S. Ct. 2160 (2016)

This case raised the issue of whether a warrantless breathalyzer and/or a warrantless blood alcohol test could be justified under the search incident to lawful arrest doctrine.

Previous case law surrounding these warrantless tests were based on the exigent circumstance doctrine. Specifically, in Schmerber v. California, 384 U.S. 757 (1966) the Supreme Court held that when a driver is arrested for driving while intoxicated, the police may compel the arrestee to submit to a warrantless blood alcohol test. The Court reasoned that due to the natural dissipation of alcohol in the arrestee's blood, there was a danger that the police would lose criminal evidence, which justified the warrantless search. Then, in Missouri v. McNeely, 113 S. Ct. 1552 (2013), the court ruled that exigent circumstances must be determined on a case-by-case basis such that, a warrant needs to be obtained unless there is a reasonable likelihood that by the time a warrant is obtained, the alcohol in the blood would have dissipated.

In determining whether a warrantless search is within the search incident to arrest doctrine, the Court weighed the intrusion on the arrestee's privacy and the degree to which the search advances a legitimate government interest.

As to breathalyzer tests, the Court held that they do not implicate significant Fourth Amendment privacy concerns because of their almost negligible physical intrusion and minimal inconvenience. In contrast, there is a strong state interest in highway safety. As such, warrantless breath tests incident to arrest for driving while intoxicated are permitted.

As to blood alcohol tests, the Court reached a different conclusion because blood tests are “significantly more intrusive” than breath tests. The Court explained that “their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test.” Blood tests require a physical extraction, which give police a wealth of information including genetic information. As such, the privacy interests outweigh the state interests. Therefore, the Fourth Amendment does not permit warrantless blood alcohol testing incident to a lawful arrest for driving while intoxicated.

The Court went on to address whether consent to such testing can render the search reasonable. Specifically, the Court held that implied consent laws that impose civil sanctions are permitted, but implied consent laws that impose criminal penalties are not valid.

Significantly, the court’s holdings clearly establish federal law and, as such, the defense of qualified immunity will not shield police officers from liability on § 1983 grounds for violating these principles.

**Fourth Department Allows Plaintiff to Amend  
Notice of Claim, Complaint and Bill of Particulars to Conform to Testimony**

Doe v. Rochester City School District, 137 A.D.3d 1761 (4th Dept. 2016)

Plaintiff commenced this action on behalf of Jane Doe, a special needs student in the Rochester City School District, as the result of an alleged assault and rape at Dr. Freddie Thomas High School. On the date of the alleged assault, Doe reported the crime to the Rochester Police Department and identified her assailant as an African-American student and reported that the incident occurred during lunchtime in the girls’ restroom. The District reviewed video surveillance and determined that the accused rapist could not have committed the crime. Thereafter, Doe reported to the police that the assailant was a white student and that the incident took place in the girls’ locker room. The District, again, reviewed surveillance and determined that the incident could not have occurred.

Subsequently, Doe filed a notice of claim alleging negligent supervision on the grounds that her Individualized Education Program (IEP) required the District to provide Doe with an aide who would accompany Doe at all times during the school day. The notice of claim alleged facts consistent with the second report to the police.

Then, at Doe’s deposition, Doe testified that her assailant was an African-American whom she believed to be a school janitor and that the incident occurred under the bleachers on the athletic field at the high school. Based on Doe’s deposition testimony, plaintiff moved for permission to amend the notice of claim, complaint and bill of particulars to conform to Doe’s testimony.

The Supreme Court denied the motion and the Fourth Department reversed. The Court noted that Doe’s documented cognitive and social delays, together with her fear of the assailant and the alleged post-traumatic stress disorder, provided a good faith basis for the amendment. The Court dismissed the District’s claim of prejudice, noting that plaintiff’s amendment did not

make “substantive changes in the theory of liability.” Moreover, the District’s claim that it no longer had video surveillance footage of the location of the assault described at the deposition was dismissed because it was a “consequence of its own failure to preserve evidence that it knew or should have known was potentially relevant.”

**City Granted Summary Judgment Where No Evidence that School Had Notice of Classmate’s Proclivity to Engage in Physically Aggressive Conduct**

Emmanuel B. v. City of New York, 131 A.D.3d 831 (1st Dept. 2016)

Plaintiff, a seven year old student at a New York City public school sustained injuries as a result of an altercation in which a classmate of his caused him to strike his head against a bookcase. Plaintiff sued the City of New York for negligent supervision. The City’s motion for summary judgment was granted.

Initially, the Court noted that while “schools have a duty to adequately supervise their students, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision, unanticipated third-party acts causing injury upon a fellow student will generally not give rise to a school’s liability in negligence absent actual or constructive notice of prior similar conduct.” The Court found that the record contained no evidence that the school had notice of the classmate’s “proclivity to engage in physically aggressive conduct.” Although there was evidence that plaintiff complained to his teacher that the classmate was picking on him and that his mother had called the principal’s office to report that her son was being bullied by unidentified classmates, the school did not have “sufficiently specific knowledge or notice” of “prior conduct similar to the unanticipated injury-causing act” by the classmate to support a finding of actual or constructive notice of the risk that the classmate would engage in such violent or physically aggressive behavior.

The Court found that summary judgment was warranted since an issue as to proximate cause was not raised. As such, there was no basis for finding that any greater level of supervision than was provided would have prevented the incident.

**Western District Finds Question of Fact as to Whether Adult Handler for Service Dog is Required to Accompany Disabled Student**

United States v. Gates-Chili Cent. School Dist., 15-CV-6583-CJS, 2016 WL 4036601 (W.D.N.Y. 2016)

D.P., a student enrolled in Gates-Chili Central School District (the “District”) and whose dog is the subject of this litigation, is a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA). Each day, D.P. is accompanied at school by her service dog, a dog handler, a full-time aide and a full-time nurse. The aide and the nurse are provided for by the District, but the dog handler is provided for by D.P.’s mother. According to the Complaint, District officials refused to allow school personnel, including the aide assigned to D.P., help handle the dog. The Complaint also alleges that the adult handler provided by D.P.’s

family, has had minimal work to do other than tethering the dog to the girl's wheelchair. The Complaint alleges that the school district is violating Title II of the ADA by requiring D.P. to bring an adult dog handler to school and on the school bus.

The District moved for summary judgment arguing that, consistent with regulations, "it is not required to provide any services with respect to a service animal brought onto the premises of a public entity by an individual." The District also contends that D.P. requires assistance for the "handling, control, direction, redirection and care and supervision of the dog."

While the Court acknowledged that the District was not required to provide handling services for the dog, the Court denied defendant's motion. The Court relied on the case of Alboniga v. School Board of Broward County, 87 F. Supp. 3d 1319 (S.D. Fla. 2015), where it was held that a disabled individual could be said to have "control" over a service animal that was tethered to a wheelchair and that absent tethering, control can be established if the disabled individual can readily direct the animal with commands or signals.

Accordingly, the Court explained that if D.P.'s dog is tethered to the wheelchair and the only assistance D.P. requires is the untethering of the dog, then D.P. can be considered in control of the service dog. However, if D.P. requires personnel to actually issue commands to the dog, as opposed to occasionally reminding the dog to do so, then D.P. cannot be considered in control of the service dog. As such, the Court found a material issue of fact as to whether D.P. can or cannot "handle" her service dog.